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U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

FLYNOIND F. DEMERY,
Booking No. 14762945,

Plaintiff,

vs.

WILLIAM GORE; Dr. ITSHIZEME;
RN 3575; RN 3255; CMO JOUSHA,

Defendants.

Civil No. 14cv2551 BEN (JLB)

ORDER:

**(1) GRANTING PLAINTIFF'S
MOTION TO PROCEED
IN FORMA PAUPERIS
(Docket No. 2)**

AND

**(2) SUA SPONTE DISMISSING
COMPLAINT FOR FAILING TO
STATE A CLAIM PURSUANT
TO 28 U.S.C. §§ 1915(e)(2)
AND 1915A(b)**

Flynoind F. Demery ("Plaintiff"), currently detained at the San Diego Central Jail ("SDCJ") in San Diego, California, and proceeding pro se, has filed a civil rights complaint ("Compl.") pursuant to 42 U.S.C. § 1983 (Docket No. 1).

Plaintiff claims that after he was booked on September 9, 2014, SDCJ officials refused to provide him with the same pain medication he claims he had been prescribed prior to incarceration for a "degenerated knee," osteoporosis, and arthritis. (See Compl. at 5). Plaintiff seeks injunctive relief as well as \$400,000 in compensatory and punitive damages. (*Id.*)

I. PLAINTIFF'S MOTION TO PROCEED IFP

Plaintiff did not prepay the civil filing fee required by 28 U.S.C. § 1914(a) when he filed his Complaint; instead, he has filed a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a). (Docket. No. 2).

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$400. 28 U.S.C. § 1914(a).¹ An action may proceed despite a plaintiff's failure to prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed IFP remains obligated to pay the entire fee in increments, regardless of whether his action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act ("PLRA"), a prisoner seeking leave to proceed IFP must submit a "certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the six-month period immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the Court assesses an initial payment of 20% of (a) the average monthly deposits in the account for the past six months, or (b) the average monthly balance in the account for the past six months, whichever is greater, unless the prisoner has no assets. 28 U.S.C. § 1915(b)(1), (4). The institution having custody of the prisoner then collects subsequent payments, assessed at 20% of the preceding month's income, in any month in which the prisoner's account exceeds \$10, and forwards those payments to the Court until the entire filing fee is paid. 28 U.S.C. § 1915(b)(2).

¹ In addition to the \$350 statutory fee, all parties filing civil actions on or after May 1, 2013, must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule) (eff. May 1, 2013). However, the additional \$50 administrative fee is waived if the plaintiff is granted leave to proceed IFP. *Id.*

1 In support of his IFP Motion, Plaintiff has submitted a certified copy of his
 2 trust account statement pursuant to 28 U.S.C. § 1915(a)(2) and Local Rule 3.2. The
 3 Court reviewed Plaintiff's trust account statement, as well as the attached prison
 4 certificate issued by a SDCJ Lieutenant verifying his available balances. Plaintiff's
 5 statements show that while he had an average monthly balance of \$900 in his
 6 account, he had no monthly deposits. Only a \$60 balance remained in his account at
 7 the time of filing. Thus, while the Court assesses Plaintiff's initial partial filing fee at
 8 \$180, it directs SDCJ officials to collect that initial amount only if sufficient funds
 9 are available at the time this Order is executed.

10 Therefore, the Court **GRANTS** Plaintiff's Motion to Proceed IFP, and
 11 **DIRECTS** the Watch Commander at SDCJ to garnish the entire \$350 balance of the
 12 filing fees mandated by 28 U.S.C. § 1914 and forward them to the Clerk of the Court
 13 pursuant to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(1).

14 **II. INITIAL SCREENING PER 28 U.S.C. §§ 1915(e)(2)(B) AND 1915A**

15 **A. Standard of Review**

16 The PLRA obligates the Court to review complaints filed by all persons
 17 proceeding IFP and by those, like Plaintiff, who are "incarcerated or detained in any
 18 facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of
 19 criminal law or the terms or conditions of parole, probation, pretrial release, or
 20 diversionary program," "as soon as practicable after docketing." 28 U.S.C. § 1915A.
 21 The Court must sua sponte dismiss complaints, or any portions thereof, which are
 22 frivolous, malicious, fail to state a claim, or which seek damages from defendants
 23 who are immune. 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *see also Rhodes v.*
 24 *Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010) (discussing § 1915A(b)); *Lopez v.*
 25 *Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (discussing § 1915(e)(2)).

26 "[W]hen determining whether a complaint states a claim, a court must accept as
 27 true all allegations of material fact and must construe those facts in the light most
 28 favorable to the plaintiff." *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see*

1 *also Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that
 2 § 1915(e)(2) “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”).
 3 However, while a plaintiff’s allegations are taken as true, courts “are not required to
 4 indulge unwarranted inferences.” *Doe I v. Wal-Mart Stores, Inc.*, 572 F.3d 677, 681
 5 (9th Cir. 2009). Thus, while the court “ha[s] an obligation where the petitioner is pro
 6 se, particularly in civil rights cases, to construe the pleadings liberally and to afford
 7 the petitioner the benefit of any doubt,” *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th
 8 Cir. 2010) (citing *Bretz v. Kelman*, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985)), it may
 9 not, in so doing, “supply essential elements of claims that were not initially pled.”
 10 *Ivey v. Board of Regents of the University of Alaska*, 673 F.2d 266, 268 (9th Cir.
 11 1982). “Vague and conclusory allegations of official participation in civil rights
 12 violations” are simply not “sufficient to withstand a motion to dismiss.” *Id.*

13 **B. 42 U.S.C. § 1983**

14 “Section 1983 creates a private right of action against individuals who, acting
 15 under color of state law, violate federal constitutional or statutory rights.” *Devereaux*
 16 *v. Abbey*, 263 F.3d 1070, 1074 (9th Cir. 2001). Section 1983 “is not itself a source of
 17 substantive rights, but merely provides a method for vindicating federal rights
 18 elsewhere conferred.” *Graham v. Connor*, 490 U.S. 386, 393-94 (1989) (internal
 19 quotation marks and citations omitted). “To establish § 1983 liability, a plaintiff must
 20 show both (1) deprivation of a right secured by the Constitution and laws of the
 21 United States, and (2) that the deprivation was committed by a person acting under
 22 color of state law.” *Tsao v. Desert Palace, Inc.*, 698 F.3d 1128, 1138 (9th Cir. 2012).

23 “Because vicarious liability is inapplicable to . . . § 1983 suits, a plaintiff must
 24 plead that each government-official defendant, through the official’s own individual
 25 actions, has violated the Constitution.” *Id.* at 676; *see also Jones v. Community*
 26 *Redevelopment Agency of Los Angeles*, 733 F.2d 646, 649 (9th Cir. 1984)
 27 (concluding that even pro se plaintiff must “allege with at least some degree of
 28 particularity overt acts which defendants engaged in” in order to state a claim).

1 “Causation is, of course, a required element of a § 1983 claim.” *Estate of Brooks v.*
2 *United States*, 197 F.3d 1245, 1248 (9th Cir. 1999). “The inquiry into causation must
3 be individualized and focus on the duties and responsibilities of each individual
4 defendant whose acts or omissions are alleged to have caused a constitutional
5 deprivation.” *Leer v. Murphy*, 844 F.2d 628, 633 (9th Cir. 1988) (citing *Rizzo*, 423
6 U.S. at 370-71).

7 A supervisor is only liable for the constitutional violations of his subordinates
8 if the supervisor participated in or directed the violations, or knew of the violations
9 and with deliberate indifference, failed to act to prevent them. *Wilson v. Seiter*, 501
10 U.S. 294, 303 (1991); *Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989). If there is
11 no affirmative link between a defendant’s conduct and the alleged injury, there is no
12 deprivation of the plaintiff’s constitutional rights. *Rizzo v. Goode*, 423 U.S. 362, 370
13 (1976).

14 Plaintiff names the Sheriff of San Diego and four other SDCJ officials,
15 including a doctor, the Chief Medical Officer, and two unnamed nurses, as
16 Defendants in the caption of his Complaint. (Compl. at 1). However, the body of his
17 pleading contains no “further factual enhancement” which describes how, or to what
18 extent, any of these individuals were actually aware of or took part in any
19 constitutional violation. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell*
20 *Atlantic v. Twombly*, 550 U.S. 544, 557 (2007)). Plaintiff includes William Gore
21 presumably because he is the Sheriff and therefore responsible for supervising the
22 SDCJ’s medical staff. However, Plaintiff includes no details whatsoever as to what
23 Sheriff Gore specifically did, or failed to do, which resulted in the violation of his
24 constitutional rights.

25 Thus, if Plaintiff seeks to sue Sheriff Gore by virtue of his supervisory duties
26 over the medical officials at SDCJ, his pleading must include sufficient “factual
27 content that allows the court to draw the reasonable inference that the defendant is
28 liable for the misconduct alleged,” *Iqbal*, 556 U.S. at 678, and include a description

1 of personal acts by Sheriff Gore which show a direct causal connection to a violation
2 of specific constitutional rights. *Taylor*, 880 F.2d at 1045.

3 Plaintiff's Complaint similarly lacks the requisite specific factual content
4 showing that Dr. Itshizeme, CMO Jousha, RN 3575, or RN 3255, may be held
5 personally liable for any misconduct. The Complaint therefore fails to state a claim
6 for relief that is plausible on its face as to any of the listed Defendants.

7 Thus, the Court finds Plaintiff's Complaint sets forth no facts which might be
8 liberally construed to support any sort of individualized constitutional claim against
9 any Defendant, all of whom Plaintiff purportedly seeks to sue based on the positions
10 they hold and not because of any individually identifiable constitutional misconduct
11 alleged to have caused Plaintiff injury. Accordingly, Plaintiff's Complaint is
12 **DISMISSED** without prejudice.

13 **C. Inadequate Medical Care Claims**

14 Because Plaintiff does include facts to suggest he wishes to pursue a claim
15 based on an alleged denial of his right to adequate medical care while detained, the
16 Court notes that only "deliberate indifference to a prisoner's serious illness or injury
17 [will] state[] a cause of action under § 1983." *Estelle v. Gamble*, 429 U.S. 97, 105
18 (1976); *see also Clouthier v. Cnty. of Contra Costa*, 591 F.3d 1232, 1241-44 (9th Cir.
19 2010).

20 First, Plaintiff must allege a "serious medical need" by demonstrating that
21 "failure to treat [his] condition could result in further significant injury or the
22 'unnecessary and wanton infliction of pain.'" *McGuckin v. Smith*, 974 F.2d 1050,
23 1059 (9th Cir. 1991), *overruled on other grounds by WMX Techs., Inc. v. Miller*, 104
24 F.3d 1133 (9th Cir. 1997) (en banc). The "existence of an injury that a reasonable
25 doctor or patient would find important and worthy of comment or treatment; the
26 presence of a medical condition that significantly affects an individual's daily
27 activities; or the existence of chronic and substantial pain are examples of indications
28 that a prisoner has a 'serious' need for medical treatment." *Id.* at 1059-60.

1 “Deliberate indifference” is evidenced only when a prisoner can show that the
 2 official he seeks to hold liable “kn[ew] of and disregard[ed] an excessive risk to
 3 inmate health and safety; the official must be both aware of facts from which the
 4 inference could be drawn that a substantial risk of serious harm exist[ed], and he must
 5 also [have] draw[n] the inference.” *Farmer v. Brennan*, 511 U.S. 825, 837 (1994).
 6 Specifically, Plaintiff must allege “factual content,” *Iqbal*, 556 U.S. at 678, which
 7 demonstrates “(a) a purposeful act or failure to respond to [his] pain or possible
 8 medical need, and (b) harm caused by the indifference.” *Wilhelm v. Rotman*, 680
 9 F.3d 1113, 1122 (9th Cir. 2012) (citing *Jett v. Penner*, 439 F.3d 1091, 1096 (9th Cir.
 10 2006)). The requisite state of mind is one of subjective recklessness, which entails
 11 more than ordinary lack of due care. *Snow v. McDaniel*, 681 F.3d 978, 985 (9th Cir.
 12 2012) (citation and quotation marks omitted); *Wilhelm*, 680 F.3d at 1122.

13 Here, Plaintiff contends he suffers from a “degenerated knee,” osteoporosis,
 14 and arthritis, and that the pain caused by these conditions was severe enough to
 15 require prescription pain medication while he was “on the streets.” (See Compl. at 3,
 16 4, 5). Thus, the Court will assume, only for purposes of screening pursuant to 28
 17 U.S.C. § 1915A, that he had a serious medical need in September 2014 when he was
 18 booked into SDCJ. See *McGuckin*, 974 F.2d at 1059; *Glass v. Goodrick-Reynaga*,
 19 No. 1:09-CV-02109 JLT, 2010 WL 5232965, at *4 (E.D. Cal. Dec. 16, 2010) (finding
 20 prisoner’s degenerative spine and arthritis a serious medical condition); see also
 21 *Washington v. Brown*, 2009 U.S. Dist. LEXIS 6846, at *39 (E.D. Cal. Jan. 21, 2009)
 22 (finding it undisputed that “chronic arthritis constitutes a serious medical need.”).

23 However, even assuming Plaintiff’s medical condition and/or pain was
 24 sufficiently serious to invoke Eighth or Fourteenth Amendment protection, he must
 25 also include in his pleading enough factual content to show that each Defendant he
 26 seeks to hold liable acted with “deliberate indifference” to his needs. As currently
 27 pleaded, Plaintiff’s Complaint alleges only that he was “receiving pain medication
 28 while on the streets,” but that he missed an appointment to renew his prescription due

1 to his incarceration. (Compl. at 3). Exhibits attached to his Complaint show,
 2 however, that while Plaintiff filed several sick call requests requesting “Perco[c]et”
 3 and oxycodone for his pain, he was examined by a doctor on October 2, 2014, who
 4 was unable to find any record of Plaintiff “taking any narcotic pain medication” prior
 5 to incarceration. (*Id.* at 11-14, 16, 18).

6 While Plaintiff may not have agreed with SDCJ medical staff’s assessment of
 7 his need for narcotic medication to treat his pain, his disagreement, without more,
 8 does not provide sufficient “factual content” to plausibly suggest that any party
 9 named as a Defendant in this case acted with deliberate indifference. *See Snow*, 681
 10 F.3d at 987 (“A difference of opinion between a physician and the prisoner—or
 11 between medical professionals—concerning what medical care is appropriate does
 12 not amount to deliberate indifference.”). Rather, Plaintiff “must show that the course
 13 of treatment the doctors chose was medically unacceptable under the circumstances
 14 and that the defendants chose this course in conscious disregard of an excessive risk
 15 to [his] health.” *Snow*, 681 F.3d at 988 (citing *Jackson v. McIntosh*, 90 F.3d 330, 332
 16 (9th Cir. 1996)) (internal quotation marks omitted).

17 Accordingly, the Court finds that Plaintiff has failed to adequately allege an
 18 inadequate medical care claim upon which section 1983 relief can be granted.
 19 Plaintiff’s Complaint is therefore **DISMISSED** without prejudice. Because he is
 20 proceeding *pro se*, however, the Court, having now provided him with “notice of the
 21 deficiencies in his complaint,” also **GRANTS** Plaintiff an opportunity to amend. *See*
 22 *Akhtar v. Mesa*, 698 F.3d 1202, 1212 (9th Cir. 2012) (citing *Ferdik v. Bonzelet*, 963
 23 F.2d 1258, 1261 (9th Cir. 1992)).

24 **III. CONCLUSION AND ORDER**

25 Good cause appearing, **IT IS HEREBY ORDERED** that:

26 1. Plaintiff’s Motion to Proceed IFP is **GRANTED**.

27 2. The Watch Commander at the SDCJ, or his designee, is **DIRECTED** to
 28 collect from Plaintiff’s trust account the total \$350 filing fee owed in this case by

1 forwarding the initial fee assessed in this Order, if sufficient funds exist, and
2 thereafter assessing monthly payments from Plaintiff's account in an amount equal to
3 twenty percent (20%) of the preceding month's income. All payments must be
4 forwarded to the Clerk of the Court each time the amount in Plaintiff's account
5 exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2) and **MUST BE CLEARLY**
6 **IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.**

7 3. The Clerk of the Court is **DIRECTED** to serve a copy of this Order on the
8 Watch Commander, San Diego Central Jail, 1173 Front Street, San Diego, California,
9 92101-3904.

10 **IT IS FURTHER ORDERED** that:

11 4. Plaintiff's Complaint is **DISMISSED** for failing to state a claim upon which
12 relief may be granted. However, Plaintiff is **GRANTED** forty-five (45) days leave
13 from the date of this Order in which to file an Amended Complaint which cures all
14 the deficiencies of pleading noted. Plaintiff's Amended Complaint must be complete
15 in itself without reference to his original pleading. *See* CivLR 15.1. Defendants not
16 named and all claims not re-alleged in the Amended Complaint will be considered
17 waived. *See Lacey v. Maricopa Cnty.*, 693 F.3d 896, 928 (9th Cir. 2012).

18
19 DATED: February 16, 2015


HON. ROGER T. BENITEZ
United States District Judge